IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

WRIT PETITION NO. 882 OF 2007

Amit Sitaram Jadhav .... Petitioner

versus

Mrs. Ashwini Amit Jadhav ..... Respondent.

Shri V.G.Mujumdar for the petitioner
Mr. Yash Sakhare i/b Y.K.S.Legal for the respondent.

CORAM; A.P. DESHPANDE, J.
DATED; 11TH JULY, 2007

P.C.;

1. Rule. Rule made returnable forthwith. Taken up for final hearing by consent of parties.

2. The parties to this petition are the husband and wife and their marriage was solemnised as per Hindu rites on 9-12-2003 at Pune. The present petitioner instituted a Hindu Marriage Petition in the Family Court at Pune, seeking a relief for restitution of conjugal rights. The respondent did not contest the said Hindu Marriage Petition and thus a decree for restitution of conjugal rights came to be passed on 8-2-2006.

3. After passing of the ex-parte decree in favour of

the petitioner and against the respondent for restitution of conjugal rights, the respondent filed a Marriage Petition in the Court at Nashik for judicial separation. The petitioner came to be served with the suit summons and put in his appearance on 4-4-2006. The matter was thereafter adjourned to 24-5-2006 and then to 10-7-2006. On 10-7-2006 as the petitioner and his counsel was absent, the court passed an order of "No written statement". According to the petitioner, his advocate was stationed at Pune and he used to attend the court at Nashik. Having realised that the advocate from Pune may not be in a position to attend all the dates, the petiitoner engaged another advocate on 11-9-2006 and he filed his vakalatnama and on the same day, an application came to be filed by the petitioner at Exh.21 objecting to the maintainability of the Marriage Petition on the ground that as Hindu Marriage Petition for restitution of conjugal rights had been decreed, another petition for judicial separation is not maintainable. The said application came to be rejected on 5-12-2006. On 16-1-2007 the petiitoner filed an application for setting aside the "No written statement" order passed on 10-7-2006 and along with the said application, has also placed on record of the trial court, the written statement opposing the Marriage Petition.

4. According to the petitioner, as there was change in the advocate after passing of the order of "No written statement", the subsequently engaged advocate was not aware of the passing of the order of "No written statement" and thus failed to file an application for setting aside the said order immediately. However, the same has been filed on 16-1-2007. The trial court has rejected the application for setting aside the "No written statement" order and has also declined to consider the written statement placed on record by the petitioner. Aggreived by this impugned order the present writ petition has been filed.

5. The learned counsel for the petitioner has submitted that if and in case the petitioner is not permitted to file the written statement, the petitioner is likely to suffer irreparable loss and utmost inconvenience would be caused to him as the petition would almost go uncontested. The learned counsel further submits that a valid objection was raised by the petiitoner to the maintainability of the Marriage Petition by raising a ground that a petition for judicial separation is not maintainable once a decree has been passed granting restitution of conjugal rights. According to the learned counsel both the reliefs claimed are incompitable. Be it as

it may, what is to be seen is that the petitioner has already filed a written statement and if the issue is decided after a contest on merit that would advance the cause of justice.

6. I feel that in the present case ends of justice could be met by directing the trial court to accept the written statement placed on record subject to payment of cost by the petitioner to the respondent with a view to compensate her. In the interest of justice the writ petition deserves to be allowed. Hence writ petition is allowed and the impugned order passed by the trial court below Exh.29 dated 22-1-2007 and the "No Written Statement" order dated 10-7-2006 is quashed and set aside. The trial court is directed to consider the written statement placed on record by the present petitioner and proceed to decide the matter on merit. This order is subject to payment of cost of Rs.10,000/- by the petitioner to the respondent. The cost shall be deposited in the trial court within a period of two weeks from today. Failure to deposit the cost within the time granted, shall result in revocation of this order. Needless to mention that it shall be open for the respondent to withdraw the cost after it is deposited by the petitioner. Rule made absolute in the above terms.

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